No. 1047

IN THE

SUPREME COURT OF THE UNITED STATES

LOGAN COLLINS, Petitioner,

versus

COMMONWEALTH OF KENTUCKY, Respondent.

PETITION FOR WRIT OF CERTIORARI.

GERALD ROBIN GRIFFIN,
705 Security Trust Bldg.,
Lexington, Ky.,

HARRY B. MILLER, JR.,
705 Security Trust Bldg.,
Lexington, Ky.,

JOHN C. ANGELIS,
Bank of Commerce Bldg.,
Lexington, Ky.,

Of Counsel.

INDEX.

	PAGE
Statement of the Case	1–4
Questions Involved	4
Constitutional Section Involved	4–5
Section I of the Fourteenth Amendment to the Constitution of the United States	4–5
Argument	5–15
Lyons v. Oklahoma, 322 U. S. 596, 605, 64 S. Ct. 1208, 88 L. Ed. 1481, 1487	5
Lisenba v. California, 314 U. S. 219, 236, 62 S. Ct. 280, 86 L. Ed. 166, 174	5
Rochin v. California, 342 U. S. 165, 173; 72 S. Ct. 205, 96 L. Ed. 183, 190	5
Fay v. New York, 332 U. S. 261, 288, 67 S. Ct. 1613, 91 L. Ed. 2043, 2060	6
Tumey v. Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A. L. R. 1243	7
Re Murchison, 349 U. S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942, 946	7
Quercia v. United States, 289 U. S. 466, 53 S. Ct. 696, 77 L. Ed. 1321	9
Hicks v. United States, 150 U. S. 442, 451, 452, 14 S. Ct. 144, 37 L. Ed. 1137, 1141	9
Starr v. United States, 153 U. S. 614, 626, 14 S. Ct. 919, 38 L. Ed. 841, 846	11
Berguin v. Pacific Electric Ry. Co., 263 Pac. 220, 223	13
Foster v. Creighton Co. v. Hall, 1 Tenn. Civ. App. 14	13
Mayor and City Council of Nashville v. Patton, 2 Tenn. Civ. App. 515, 529	14

PAGE

Southland Greyhound Lines v. Matthews, 74 S. W. 2d 713, 716 (Texas) 14

People v. Mahoney, 258 Pac. 607, 610 (California). 14

Anderson v. Commonwealth, 302 Ky. 275, 194 S. W. 2d 530 14

Morton v. Commonwealth, 284 S. W. 2d 670 (Ky. 1955) 15

Conclusion 15–17

TABLE OF CASES

	PAGE
Anderson v. Commonwealth, 302 Ky. 275, 194 S. W. 2d 530	14
Berguin v. Pacific Electric Ry. Co., 263 Pac. 220, 223	13
Fay v. New York, 332 U. S. 261, 288, 67 S. Ct. 1613; 91 L. Ed. 2043, 2060	6
Foster v. Creighton Co. v. Hall, 1 Tenn. Civ. App. 14	13
Hicks v. United States, 150 U. S. 442, 451, 452, 14 S. Ct. 144, 37 L. Ed. 1137, 1141	9
Lisenba v. California, 314 U. S. 219, 236 62 S. Ct. 280, L. Ed. 166, 174	5
Lyons v. Oklahoma, 322 U. S. 596, 605, 64 S. Ct. 1208, 88 L. Ed. 1481, 1487	5
Mayor and City Council of Nashville v. Patton, 2 Tenn. Civ. App. 515, 529	14
Morton v. Commonwealth, 284 S. W. 2d 670 (Ky. 1955)	15
People v. Mahoney, 258 Pac. 607, 610 (Calif.)	14
Quercia v. United States, 289 U. S. 466, 53 S. Ct. 696, 77 L. Ed. 1321	9
Re Murchison, 349 U. S. 133, 136; 75 S. Ct. 623, 99 L. Ed. 942, 946	10
Rochin v. California, 342 U. S. 165, 173, 72 S. Ct. 205, 96 L. Ed. 183, 190	5
Southland Greyhound Lines v. Matthews, 74 S. W. 2d 713, 716 (Texas)	14
Starr v. United States, 153 U. S. 614, 626, 14 S. Ct. 919, 38 L. Ed. 841, 846	11
Tumey v. Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A. L. R. 1243	7

IN THE

Supreme Court of the United States

LOGAN COLLINS, - - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petition of Logan Collins respectfully asks for a writ of certiorari directed to the Court of Appeals of the State of Kentucky, the Court in which the record of this cause is now lodged.

The official report of the Court of Appeals of Kentucky is located in 297 S. W. 2d 54 (Advanced Sheet, Feb. 12, 1957), and is appended hereto as Appendix A. Your petitioner states that the record shows that this action was commenced in the Circuit Court of Perry County, Kentucky, upon indictment of petitioner for carrying a concealed deadly weapon in violation of Kentucky Revised Statutes 435.230 and was convicted by a jury on November 21, 1955. Judgment was rendered and petitioner sentenced to confinement for a period of two years on November 21, 1955 (Appendix B).

Petitioner upon the trial claimed that the pistol could not have been concealed because the pocket

from which the pistol was removed had been sewed up several times before the incident, and, therefore, the pistol would not fit all the way down in the pocket. The trial judge stated in the jury's presence and hearing: "They've been sewn up once since you had the pistol taken out of them, too, haven't they?". (See transcript of evidence of Logan Collins, Appendix C.) The trial judge also stated in the presence of, and audible to, the jury while petitioner and counsel were conferring in an anteroom: "Tell them to come in, they have already had an hour to fix that pocket that the gun was in" (Affidavit of Frank Hounshel, Appendix D).

Petitioner states that on November 21, 1955, he filed a Motion and Grounds for New Trial with the Circuit Court of Perry County which was denied. Petitioner states that a Bill of Exceptions was filed on March 8, 1956. On March 5, 1956, petitioner filed a Petition for Writ of Coram Nobis in the Circuit Court of Perry County, Kentucky. In this petition, he specifically set out the conduct of the Judge of the Circuit Court and claimed that he was denied due process of law in violation of the Fourteenth Amendment to the Constitution of the United States (Appendix E). A Response to the Petition for Writ of Coram Nobis was filed and on March 12, 1956, without notice to petitioner or his counsel or without a trial on the isues joined, the Judge of the Circuit Court of Perry County, Kentucky, entered an order denying the Petition for Writ of Coram Nobis. Petitioner's claim of Constitutional violations was not mentioned by the Court.

Petitioner appealed to the Court of Appeals of Kentucky from the judgment of conviction and also from the order denying his petition for Writ of Coram Nobis. Petitioner's brief in the Court of Appeals for the first time specifically raised the question of violation of the Sixth Amendment to the Constitution of the United States in that petitioner was denied an impartial trial by jury. The petitioner also renewed his objection that the Fourteenth Amendment to the Constitution of the United States had been violated (Appendix F).

Petitioner states that the Court of Appeals of Kentucky on October 12, 1956, affirmed the conviction of petitioner and also denied his petition for Writ of Coram Nobis. On November 14, 1956, petitioner made a motion for a rehearing by the Court of Appeals and on January 25, 1957, said petition was denied. On February 20, 1957, on motion of petitioner, the Court of Appeals of Kentucky entered an order wherein the mandate was recalled granting the petitioner ninety (90) days for the purpose of petitioning to the Supreme Court of the United States for a Writ of Certiorari (Appendix G). The Honorable Harold H. Burton, Associate Justice of the Supreme Court of the United States upon petitioner's application entered an order extending the time to file a petition for writ of certiorari to and including June 3, 1957.

Petitioner states that the judgment of the Court of Appeals of Kentucky in this cause controvenes the Fourteenth and Sixth Amendments to the Constitution of the United State and is repugnant thereto.

The Supreme Court of the United States has jurisdiction to review the judgment of the Circuit Court of Perry County as affirmed by the Kentucky Court of Appeals by reason of Section 1257 (3) of Title 28, United States Code Annotated.

The question presented is whether or not the conduct on the part of the trial judge commenting in the presence and hearing of the jury, "They've been sewn up once since you had the pistol taken out of them too, haven't they?" and "Tell them to come in, they have already had an hour to fix that pocket that the gun was in," when the defendant charged with carrying a concealed deadly weapon is claiming that the weapon could not have been concealed because the pocket from which the pistol was removed had been sewn up several times before the incident and was not deep enough to conceal the pistol, is so prejudicial as to deprive the defendant of a fair trial and deprive him of due process of law. It must also be determined whether or not the failure of defendant's counsel to object to this conduct on the part of the judge waived his rights under the constitution.

The constitutional provision which is involved in this petition is Section I of the Fourteenth Amendment to the Constitution of the United Staes. Said Amendmen reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

> immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By way of argument in determining whether or not petitioner's constitutional rights have been violated first of all let us see what is required of the State by the due process of the law clause of the Fourteenth Amendment of the Constitution of the United States.

In the case of

> *Lyons* v. *Oklahoma,* 322 U. S. 596, 605, 64 S. Ct. 1208, 88 L. Ed. 1481, 1487,

the Supreme Court of the United States stated:

> "The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of 'that fundamental fairness essential to the very concept of justice,' and in a way that 'necessarily prevents a fair trial'."

The position was taken by the Court in

> *Lisenba* v. *California,* 314 U. S. 219, 236, 62 S. Ct. 280, 86 L. Ed. 166, 174,

that the violation of due process of law is not an exact thing, but rather you must look at the individual in effect to see whether or not there has been "fair play" granted to the defendant. In the case of

> *Rochin* v. *California,* 342 U. S. 165, 173; 72 S. Ct. 205; 96 L. Ed. 183, 190,

the Court in determining whether or not the due process clause had been violated by conviction of the defendant based upon evidence forcibly pumped from his stomach stated:

> "Due process of law, as a historic and generative principle, precludes defining, and thereby confining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' See Mr. Chief Justice Hughes, speaking for a unanimous Court in Brown v. Mississippi, 297 U. S. 278, 285, 286, 80 L. Ed. 682, 686, 687, 56 S. Ct. 461."

Of course the above cited cases deal with different factual situations, but it does give us the picture that a conviction in a state court cannot stand by reason of a violation of the due process clause where it is shown that the defendant was not convicted by a fair trial.

The conduct of the judge at a trial is just as much a part of the trial as the actions of the attorneys for the government and the defense and the jury. In the case of

> *Fay* v. *New York*, 332 U. S. 261, 288; 67 S. Ct. 1613; 91 L. Ed. 2043, 2060,

wherein the Court in considering whether or not it violated due process of law for a defendant in a state court to be tried by a blue-ribbon jury stated:

> "But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in

which the hearing is a real one, not a shame or pretense. Palko v. Connecticut, 302 U. S. 319, 327, 82 L. Ed. 288, 293, 58 S. Ct. 149; Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406; Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265. Trial must be held before a tribunal not biased by interest in the event. Tumey v. Ohio, 273 U. S. 510, 71 L. Ed. 749, 47 S. Ct. 437, 50 A. L. R. 1243."

In the case of

Tumey v. *Ohio,* 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 A. L. R. 1243,

the Court followed the position that a defendant in a state court is entitled to an unbiased judge and that payment of the judge who is trying the defendant by fee collectible solely on conviction deprives the defendant of the due process of law afforded to him by the Fourteenth Amendment of the Constitution of the United States. The Court also brought out that the trial judge must be an unbiased party, who must refrain from conduct "which might lead him not to hold the balance nice, clear and true between the state and the accused" and that the failure to do this "denies the latter due process of law."

As another example of conduct on the part of the trial judge which was held to violate the due process of law clause see

Re Murchison, 349 U. S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942, 946.

In this case a judge acted as a special one-man grand jury. He called certain witnesses before the grand

jury who refused to testify. The judge then charged them with contempt and then acted as the trial judge in the case on the contempt charge. The Court held that this violated due process and stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. ... Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U. S. 11, 99 L. Ed. 11, 75 S. Ct. 11."

Can it be stated that a judge who has stripped a defendant of his sole defense by the words "They've been sewn up once since you had the pistol taken out of them too, haven't they?" spoken to the defendant and in the presence of the jury, has maintained the delicate balance that is necessary or that this judge has weighed the scales of justice equally between the contending parties? Obviously, this is not the fair play that is necessary for a valid trial of a defendant who faces confinement in the penitentiary. The fact that the trial judge disbelieves the sole defense of this defendant and

expresses his feeling openly in the presence of the jury obviously would tend to influence the jury, and absolutely deprive the defendant of an impartial trial by an impartial tribunal.

At this time we would like to call to the Court's attention the fact that under the procedural law in Kentucky in criminal cases the trial judge is not allowed to comment on the evidence and can only give the jury written instructions of the law of the case. This being true let us examine some federal cases (where the judge has the right to comment on the evidence) where the comments by the judge were so prejudicial as to warrant a reversal by the Supreme Court.

In the case of

Quercia v. *United States*, 289 U. S. 466, 53 S. Ct. 696, 77 L. Ed. 1321,

the defendant was convicted of a narcotic violation. The judge in summation to the jury commented on the fact that the defendant in testifying wiped his hand and stated that this was almost always an indication of lying. He then went on to say that this was his opinion, but that the jury did not have to agree with him. These utterances were considered highly prejudicial and the conviction was set aside because of this conduct on the part of the trial judge.

In the case of

Hicks v. *United States*, 150 U. S. 442, 451, 452, 14 S. Ct. 144, 37 L. Ed. 1137, 1141,

the trial judge suggested to the jury that there was or might be "a conflict as to material facts between the

statements of the accused and the statements of the other witnesses who are telling the truth." The Court there stated that "The obvious objection to this suggestion is in its assumption that the other witnesses, whose statements contradicted those of the accused, were 'telling the truth'." The judge also instructed the jury that they could consider the interest of the defendant in the case and his motive for telling the truth or not telling the truth.

The Court in reversing the conviction because of these comments on the part of the trial judge stated:

> "It is not easy to say what effect this instruction had upon the jury. If this were the only objectionable language contained in the charge, we might hesitate in saying that it amounted to reversible error. It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and, perhaps, a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that *the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, given a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability.* The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise, be a *competent* witness'. *The policy*

> *of this enactment should not be defeated by hostile comments of the trial judge; whose duty it is to give reasonable effect and force to the law.*" (Emphasis writers'.)

It seems obvious that the trial judge here has indicated to the jury that he does not believe the testimony of the petitioner, Logan Collins, and so therefore, why should the jury believe it. It is felt that the right of the petitioner, Logan Collins, to testify on his own behalf was completely destroyed when the judge threw his weight to the side of the prosecution.

In the case of

> *Starr* v. *United States*, 153 U. S. 614, 626, 14 S. Ct. 919, 38 L. Ed. 841, 846,

the trial judge expressed indignation at the fact that a public officer who was protecting the public had been killed in the exercise of his duty. The Court held that this conduct on the part of the trial judge was improper and remanded the cause with the direction to grant the defendant a new trial. The Court stated:

> "The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances."

If the comments in the above cited cases were error when made in a judicial system which allows the court

to comment on the evidence, think how much worse it is when a comment that is equally as erroneous is made by a judge in a state judicial system which does not allow the court to comment upon the evidence. The comment by the judge when Logan Collins was testifying completely stripped him of his defense and it was bound to have limited the right and duty of the jury to exercise an independent judgment. Logan Collins was entitled to a trial by jury, not a trial by judge. To allow conduct such as this to prevail in the trial of a defendant whose liberty is at stake completely removes the mantle of protection that is placed upon his shoulders by the due process of law clause of the Constitution of the United States.

This brings us to one final question. The Court of Appeals of Kentucky in reviewing Logan Collins' case agreed that this conduct on the part of the trial judge was highly prejudicial, but stated that since petitioner's attorney had not objected to this at the trial that he had waived his objection. It is true, as a general rule, that unless an objection is taken to evidence and procedure that occurred upon the trial, the errors are waived. However, the exception to this general rule is in those cases where the court itself usurps this authority and power and unconstitutionally attempts to influence the jury by prejudicial statements and then is asked to rule on his own conduct. Under such a situation it is not required that the party prejudiced or his counsel shall object and except to the prejudicial conduct on the part of the trial judge. This exception

to the general rule and the reason therefore, is clearly pointed out in the case of

Berguin v. *Pacific Electric Ry. Co.*, 263 Pac. 220, 223,

wherein the Supreme Court of California stated:

> "But the reasons for this rule are entirely absent when applied to the acts and conduct of the court himself . . . The remarks would probably have been repeated with emphasis, and in addition counsel would have found himself anything but pleasant or secure."

In discussing this rule Volume 64, Corpus Juris, Section 112, page 109, points out that

> ". . . if irregularities are so serious as to make it clearly appear that there has been a denial of a fair and impartial trial according to the forms and procedures of the law, the want of objections or exceptions is not fatal."

In the case of

Foster v. *Creighton Co.* v. *Hall*, 1 Tenn. Civ. App. 14,

there is an exhaustive opinion devoted to the question of waiver when comments are made by a judge. The Court there stated:

> "'It is not essential in all cases that exception should be made in the lower court, and at the time of the improper remarks in the presence of the jury, but it is better practice to do so."

This general position has been followed in

Mayor and City Council of Nashville v. *Patton*, 2 Tenn. Civ. App. 515, 529; *Southland Greyhound Lines* v. *Matthews*, 74 S. W. 2d 713, 716 (Texas), and *People* v. *Mahoney*, 258 Pac. 607, 610 (California).

It seems strange that the Court of Appeals of Kentucky has in other cases taken the position that misconduct on the part of the judge does not require an objection and that failure to object does not waive the impropriety of the judge's conduct. Kentucky has a criminal code section which provides that in cases where the defendant may receive death or life imprisonment that the jurors are not allowed to separate except by agreement of the Commonwealth's and Defense attorneys. In the case of

Anderson v. *Commonwealth*, 302 Ky. 275, 194 S. W. 2d 530,

the Court asked counsel in the presence of the jury if there was any objection to the jury separating. The counsel on both sides agreed and the jury was allowed to separate. The Court of Appeals of Kentucky held this to be bad and stated:

> "We think it improper for the court, in the presence of the jury, to put counsel in the position of having to agree or object to the separation of the jury."

The Court went on to say:

> "As suggested in the brief for appellant, under the circumstances, all counsel could do was to take

> the course and follow the suggestion of the court, 'smile and undertake to make it appear that it was a pleasure to concur in a suggestion of the trial judge'. This we hold to be reversible error."

Thus it seems that in the Anderson case the defendant's attorney even agreed to the conduct of the judge and there the Court held that the conduct was bad and reversed the case.

It is apparent that the Kentucky Courts have not in all instances in the past required the defendant to object or waive his objection to the conduct by the court. The Anderson case above cited was also followed in the case of *Morton* v. *Commonwealth*, 284 S. W. 2d 670 (Kentucky, Dec. 2, 1955). Here again there was no objection to the comment by the Court in asking the defendant's attorney whether he would agree to the separation. Defendant's attorney agreed to the separation and once again the Court of Appeals of Kentucky reversed the conviction for the same reason. Thus there is no reason for the Court of Appeals to have in the present case claimed that the defendant, Logan Collins, waived his right to a fair and impartial trial by not objecting to the conduct of the court.

Justice should never depend on the art of counsel nor the skill of the advocate, but the merits of the cause. To say that the mistake of counsel remedies the error of the Court is to say that only those properly represented will prevail. Democracy was not founded on such precepts and, hence, this conviction must be reversed.

In conclusion we would like to point out that this writer is in much the same position as an appellate court in that he did not represent the petitioner at his trial and became familiar with the facts of the case by reading the transcript of the record. In reading the record and the improper comments of the trial judge the phrase "violation of due process of law" seemed to merely leap from the printed page into this writer's mind; it being so apparent that the conduct of the trial judge was improper. It also seemed in the present case that at the trial instead of having a Goodess of Justice blindfolded and holding an equally balanced scale we instead had a Goddess of Justice from which the blind had slipped from the eye facing the prosecutor and instead of holding her sword away from the scales she is resting its point upon the scale tipping its balance in favor of the prosecution.

A certified copy of the transcript of the record of the proceedings in all of said Courts in this case including the Court of Appeals of the State of Kentucky is submitted herewith.

Your petitioner is advised and believes that the judgment of the Court of Appeals of the State of Kentucky in this cause is erroneous in the manner and form herein set forth as appears from the said transcript of the record and proceedings and this Honorable Court ought to require this cause to be certified to it for review, consideration and final determination as provided by law.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under

the seal of this Court directed to the Court of Appeals of the State of Kentucky to the end that the judgment of the said Court of Appeals of the State of Kentucky may be reviewed, considered and determined as provided by the law and that this Honorable Court may correct the errors complained of herein by your petitioner and reverse said judgment of the Court of Appeals of the State of Kentucky, and remand said cause and grant such other and further relief as from the nature of the case your petitioner may be entitled in pursuance of the law.

GERALD ROBIN GRIFFIN,
705 Security Trust Bldg.,
Lexington, Ky.,

HARRY B. MILLER, JR.,
705 Security Trust Bldg.,
Lexington, Ky.,

JOHN C. ANGGELIS,
Bank of Commerce Bldg.,
Lexington, Ky.

Of Counsel:
MILLER & GRIFFIN.

I hereby certify that I have served a copy of the within petition for Writ of Certiorari on the Commonwealth of Kentucky by depositing a copy in a United States mail box with first class postage prepaid addressed to Jo Ferguson, Attorney General, Capitol Building, Frankfort, Kentucky, Attorney for the Respondent on this the ____ day of May, 1957.

APPENDIX A.

LOGAN COLLINS, - - - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - - *Appellee.*

OPINION OF THE COURT BY JUDGE STEWART—AFFIRMING.

Logan Collins was convicted of the offense of carrying a deadly weapon concealed, in violation of KRS 435.230 (1), and was given a sentence of two years in the State Reformatory at LaGrange. He filed a motion and grounds for new trial which was overruled. Time was given to prepare a bill of exceptions until the 24th of February, 1956 term, of the lower court. On March 8, 1956, the bill of exceptions was signed and approved by the circuit judge and ordered filed and made a part of the record. On March 5, 1956, three days before the certification of the bill of exceptions, Collins lodged a petition for a writ of coram nobis, supported by four affidavits, one of which was later withdrawn. Five days later the Commonwealth entered a response supported by counter affidavits. The petition was dismissed without a hearing on March 12, 1956.

This appeal is prosecuted from the judgment entered on the jury verdict, and also from the order dismissing the petition.

We will first consider the appeal from the judgment of conviction. There is only one ground urged for reversal and this concerns a remark of the trial judge made during the course of the trial. To grasp the significance of the statement it will be necessary to give the factual background. Collins was arrested for being publicly drunk and a search of his person brought to light a snubnosed .38 revolver in the right front pocket of his trousers. One

of Collins' principal contentions was that the pistol could not have been concealed because the pocket the gun was in had been sewed up so near the opening that the pistol would not fit all the way down and therefore was in plain sight. The Commonwealth, of course, maintained the pocket had been sewed up after the incident. Collins testified that carrying large quantities of change around in his pockets, as he constantly did in his business, had ripped his pockets on several occasions, and that this particular pocket had been sewed up at least three times. At this juncture in his testimony the trial judge interjected: "They've been sewn up once since you had that pistol taken out of them, too, haven't they?"

Collins insists this utterance of the trial judge indicated to the jury his disbelief in the veracity of Collins' testimony on this point and that this tended to prejudice the jury against him. We think that this gratuitous statement might have had that effect, and we believe the observation of the trial judge, carrying with it the weight that a circuit judge's words usually have on a jury, was so prejudicial that it would constitute a reversible error if such were properly before us. However, the record shows that the language under attack was not objected to in any manner; hence, it must be deemed to have been waived. It is an elementary rule of procedure in a criminal trial that errors not brought to the attention of the trial judge and not preserved by exceptions to his rulings are not available on an appeal to this Court. See Ramsey v. Commonwealth and Guinan v. Commonwealth, Ky., 267 S. W. 2d 730; Warren v. Commonwealth, Ky., 256 S. W. 368.

The appeal from the order entered below dismissing the petition for a writ of coram nobis advances two alleged errors as a basis for the reversal of the judgment: (1) The writ should have been granted because a deputy sheriff of Perry County served on the grand jury which returned the indictment against Collins; and (2) the writ

should have issued because Collins' substantial rights were prejudiced by improper remarks supposedly made by the trial judge in the presence of the jury, and when Collins and his counsel were outside the courtroom, which tended to discredit his defense.

We agree with the trial judge that the petition should have been denied. A writ of coram nobis is an extraordinary remedy, Kinder v. Commonwealth, Ky., 269 S. W. 2d 212, and it is well established that this extraordinary remedy may be resorted to only after all other judicial processes have been exhausted. Merrifield v. Commonwealth, Ky., 283 S. W. 2d 214. The writ will not lie where there is another adequate remedy. 24 C. J. S., Criminal Law, p. 147. Was there another adequate remedy in this case? Obviously there was, because we believe it cannot be questioned, under the facts presented, that when Collins appealed from the judgment of conviction he had ample opportunity to include in the appeal record all the alleged errors he complained of in his petition for a writ of coram nobis.

That Collins did not take advantage of the opportunity to embrace all his grounds for reversal in the direct appeal record is attributable to his failure to act seasonably. It is conceded the issues raised in the petition are "new matters" in the sense that the record of the appeal from the judgment of conviction is silent with reference to them, but this does not mean, if he had been diligent, they could not have been promptly discovered and properly authenticated in that record for consideration by this court. One of the alleged errors occurred before the trial; the other, during it. Thus it is clear Collins learned of, or could have ascertained, these so-called errors in time to have included them in his motion and grounds for a new trial and to have had them duly incorporated in the bill of exceptions. Thereafter he could have appealed from any rulings that were adverse to him. Not only was appeal an

adequate remedy under the circumstances, and this fact in itself requires a denial of the writ Collins seeks, but coram nobis also will not lie where advantage could have been taken of the alleged error at the trial, as where facts complained of were known before or at the trial or could by due diligence have been ascertained. See 24 C. J. S., Criminal Law, p. 148.

More to the point is the general proposition that it is improper to seek a writ of coram nobis while an appeal of the case is pending, even if the writ is sought on grounds which would not be available in the appeal itself. In other words, there is no need to seek extraordinary relief to set aside a judgment which is not final, since it is always possible it might be reversed on appeal. Though there is no authority on this point in this jurisdiction, the case of Stephenson v. State, 206 Ind. 171, 186 N. E. 293, made the following pertinent statement in this connection: "The court in which the judgment was originally entered has no jurisdiction to entertain such a petition (i.e. a petition for a writ of coram nobis) pending disposition of an appeal to this court * * *." It is apparent, under the authority of the Stephenson opinion, that coram nobis was resorted to prematurely.

Running like a thread throughout the brief of Collins' attorney is the contention that he was denied due process of law because his petition was dismissed without a hearing. As we have previously shown in our discussion the petition did not state sufficient facts to justify the issuance of the writ. Aside from this, it has been held that since coram nobis is essentially a civil action no constitutional rights are infringed when the trial court refused to follow the procedures ordinarily associated with criminal prosecutions. See Elliott v. Commonwealth and Same v. Buchanan, 292 Ky. 614, 167 S. W. 2d 703.

For the reasons given, the judgment in each case is affirmed.

APPENDIX B.

COMMONWEALTH OF KENTUCKY, - - - - *Plaintiff,*

v. 4972

LOGAN COLLINS, - - - - - - - *Defendant.*

JUDGMENT CARRYING CONCEALED A DEADLY WEAPON.

The defendant was brought into open court in custody of the Jailer and was informed as the nature of the indictment, his pleas and the verdict of the jury, and was asked by the court if he had any legal grounds for show the court why judgment should not be passed on him, and none shown the court, it is the judgment of this court that the defendant be taken by the sheriff of Perry County, and there delivered to the Warden of the State Reformatory at LaGrange, Kentucky, and there be confined for the period of two (2) years at hard labor.

This 21st day of November, 1955.

APPENDIX C.

REDIRECT EXAMINATION OF LOGAN COLLINS IN PART.

Q. 1. You are the same Logan Collins who is the defendant in this case?

A. I am.

Q. 2. Do you have the overall trousers that you were wearing on that occasion when Jack Fields arrested you?

A. I do.

Q. 3. Will you describe them to the jury first—the pockets, and the condition of them, and all, before I hand them to you?

A. Yes. The pockets of them, they're worn out, and had been sewn up, because in my business there, I carry quite a bit of change around, and therefore, my pockets wear out pretty fast—pretty rapid, and those pockets, both pockets, have been sewn up—one of them has been sewn up three times, to make them so they would hold my change—

By the Court: They've been sewn up once since you had that pistol taken out of them too, haven't they?

A. Absolutely not.

APPENDIX D.

AFFIDAVIT OF FRANK HOUNSHEL IN PART.

Affiant states that during the trial of the case of Commonwealth v. Logan Collins in the Perry Circuit Court on the 21st day of November, 1955, I was in the court room immediately prior to the time court resumed after the Noon recess; the defendant and his attorney were in a conference in an anteroom of the court house. The trial Judge was on the bench and the jury trying the case was in the box; I was seated near the rear of the court room; at that time and place I heard the Judge say to the Clerk "tell them to come in, they have already had an hour to fix that pocket that the gun was in".

Affiant states that on one or two other occasions the Judge, in the presence of the Jury, referred to the pocket of the trousers having been sewed up, in a tone of voice and in a manner that conveyed the impression that the Court did not believe the testimony of the defendant previously given to the jury that the pocket had been sewed up prior to his arrest on the charges for which he was being tried.

(s) Frank Hounshel

Subscribed and sworn to before me by Frank Hounshel this the 23rd day of February, 1956.

My commission will expire December 14, 1957.

(s) Ann Rader,
Notary Public,
Perry County, Kentucky.

APPENDIX E.

PETITION FOR WRIT OF CORAM NOBIS IN PART.

3. As further grounds for the issuance of the writ of coram nobis, your petitioner respectfully states that during his trial and at a time when he and his attorney were in a witness room off from the main court room in a conference, the Judge of this court, who presided at the trial, in the presence and hearing of all the jury said to the Clerk of the Court: "Tell them (referring to your petitioner and his attorney) to come in, they have already had an hour to fix that pocket." And he states that neither he nor his attorney had knowledge of said prejudicial statement until after the trial and, by reason of his lack of knowledge of what the court said out of his presence and the presence of his attorney neither he nor his attorney was afforded an opportunity to object to said prejudicial statement or to move to set aside the swearing of the jury, and he files herewith as a part hereof affidavits . . . showing that not only did the court make said statement out of his presence, but that on several other occasions throughout the trial, the said Judge in the presence of the jury and loud enough for the jury to hear, made reference to the pocket of the trousers of your petitioner as having been sewed up in order to leave the jury to believe that your petitioner had done this for the purpose of misleading the jury to believe that your petitioner had improperly done this in order to demonstrate that his pocket would not conceal the pistol, which he was accused of having concealed, and your petitioner states that said statements made by the court were made in such a tone of voice as to clearly leave the impression with the jury that the court did not believe the testimony of your petitioner, as had

been previously given, to the effect that the pocket of his trousers had been sewed up prior to his arrest on the charge for which he was being tried. He states that these highly prejudicial and unwarranted statements tended to and were such that did influence the members of the jury in their decision on the facts in this case. Your petitioner respectfully states that the making of said statements in the presence of the jury was arbitrary and unlawful and by reason thereof denied to your petitioner due process of law as guaranteed to him under said Constitution of Kentucky and the Constitution of the United States as foresaid, and the making of said statements by said Judge in the presence of the jury clearly demonstrated that the court trying him was not impartial, and he states that by reason thereof he was denied due process of law in violation of Section 14 of the Constitution of Kentucky and the Fourteenth Amendment to the Constitution of the United States.

APPENDIX F.

BRIEF FOR APPELLANT IN PART.

Appellant's Constitutional Rights Violated.

I

Under the provisions of Section Fourteen of the Bill of Rights of the Kentucky Constitution and under the provisions of the Fourteenth Amendment to the Constitution of the United States, appellant was entitled to a trial by due course of law, and under the provisions of the Bill of Rights of the Constitution of Kentucky, Section 7, and the United States Section 6, he was entitled to a public trial by an impartial jury.

APPENDIX G.

COURT OF APPEALS OF KENTUCKY

No. ———

LOGAN COLLINS, - - - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

ORDER.

The appellant, Logan Collins, by counsel having moved that the mandate issued herein on the 25th day of January, 1957, be recalled and that proceedings thereon be stayed until Petition for Writ of Certiorari be filed in the Supreme Court of the United States within the time and manner provided by the Judicial Code of the United States, said motion is allowed and it is therefore ordered that said mandate be recalled and proceedings thereon be stayed, conditioned, however, on the giving of good and sufficient security that if the appellant fails to make application for such Writ within the time alloted therefor, or fails to obtain an Order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the appellee may sustain by reason of the stay.

This 20th day of February, 1957.

Chief Justice,
Court of Appeals of Kentucky.